BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

RICHARD M. DENNES, M.D.
(Petitioner)

PRECEDENT
TAX DECISION
No. P-T-302
Case No. T-75-35

Employer Account No.

DEPARTMENT OF BENEFIT PAYMENTS

Office of Appeals No. SF-T-7605

The petitioner has appealed from the decision of the administrative law judge which dismissed his petition for review filed under Unemployment Insurance Code section 1035, and which affirmed the Department's denial of a ruling or determination to the petitioner.

STATEMENT OF FACTS

The petitioner was the last employer of Shirley F. Irving, who filed a claim for unemployment insurance benefits effective October 28, 1973. In accordance with the provisions of Unemployment Insurance Code section 1327, notice of the filing of this claim was duly mailed to the petitioner on departmental form DE 1101C on October 29, 1973. Petitioner did not respond to this notice as required by code section 1327, and permitted by code section 1030(a), until December 12, 1973.

In his response, the petitioner stated that "Shirley Irving was discharged for misconduct connected with her work." At that time he did not elaborate on the facts of the alleged misconduct, nor did he explain the cause of the 34-day delay in his response to the notice of the filing of the claim. It is the petitioner's recollection, however, that he had received a phone call from a Department interviewer late in October or early in November of 1973, within a few weeks after the claimant's termination, and that during that telephone conversation, he had orally furnished detailed information to the Department.

A written departmental record of interview of the claimant made on December 17, 1973 reflects that the Department interviewer telephoned the petitioner at that time, and that the petitioner stated that the claimant had been discharged because she stole and lied. Petitioner told the interviewer that the claimant had accepted cash payments from patients giving them receipts, and then wrote these payments off against a credit account so that the patients did not get credit for these payments. He also stated to the interviewer that the claimant wrote extra paychecks to herself. He admitted to the interviewer that he had previously given the claimant notice and a future date of layoff before all of this came up.

The claimant denied all of the petitioner's charges of misconduct. The Department interviewer concluded that there was no factual evidence to support the charges and found the claimant eligible on the misconduct issue. There is no indication in the record of interview of any discussion between the interviewer and the petitioner in regard to the cause of the petitioner's delay in responding to the notice of the filing of the claim.

On December 17, 1973, the Department mailed to the petitioner a notice of its denial of a ruling or determination. The denial was based upon the Department's finding that the petitioner had not responded to this first notice of the filing of the claim within the statutory time limits after it had been mailed to him. In this notice the Department advised the petitioner that this denial would be reconsidered within 15 days if he submitted an explanation of the cause of delay in responding to the notice of the filing of the claim.

The petitioner responded to this denial by a letter dated December 19, 1973 in which he explained his delay by stating that he had not received the form DE 1101C notice "until ten days ago, at which time I completed it and returned it to you." In this letter he asked for "an appeal on your ruling" and expressed his desire for a hearing in connection with it. The Department neglected to process this letter as an appeal to a referee.

The Department did, however, proceed to reconsider its previous denial of a ruling or determination to the petitioner. The fifteenth day after the Department's mailing of the notice of its previous denial was January 1, 1974, a legal holiday. On January 2, 1974, the Department mailed a second notice of denial of ruling or determination to the petitioner.

The second denial made after reconsideration was based upon the finding by the Department that the reasons submitted by the petitioner did not constitute good cause for his delay in responding to the notice of the filing of the claim. In particular, this second denial notice stated that: "There is no evidence to indicate that the delay in responding was due to factors beyond your control." The petitioner did not file any further appeal from this denial notice.

Contemporaneously with these events, under date of December 14, 1973, the Department mailed notice of the computation of the claim to the petitioner. On December 16, 1973, the petitioner responded to this notice by stating that:

> "Mrs. Shirley Irving was dismissed on 10/16/73 for serious misconduct. This involved stealing money and lying plus hiding mishandled work. Please contact me if you need further information."

On December 19, 1973, the Department mailed a postcard to the petitioner which stated that he had already received a ruling and/or determination on the termination in question.

Under date of November 19, 1974, but actually at an earlier date, the Department mailed notice to the petitioner of a charge of $1,278 that had been made to his reserve account as of the June 30, 1974 computation date, in connection with benefits paid to Shirley F. Irving. Petitioner replied to this notice on November 13, 1974 protesting the charge. As grounds of protest, he stated that:

> "Mrs. Shirley Irving was terminated last year because of stealing from the office. Shortly thereafter she applied for unemployment benefits, and they were denied, and we were issued a DE-10E0. If you have any further questions, do not hesitate to contact me, or if you want a copy of the ruling, I would be glad to send it to you."

By his reference to form DE-10E0, the petitioner is apparently referring to departmental form DE 1080, Notice of Determination. There is nothing in the evidence to indicate that a form DE 1080 was ever issued to petitioner in connection with this termination. Petitioner did not present any such form in evidence at the hearing.

On March 11, 1975, the Department denied petitioner's protest of the charge. In its denial letter, the Department referred to its having twice notified the petitioner of its denial of a ruling or determination. It made no mention of the petitioner's still unprocessed appeal contained in his letter of December 19, 1973.

On March 19, 1975 the petitioner filed the petition in this current proceeding, for review of the Department's denial of his protest of the charge. At the hearing on the petition, the administrative law judge discovered the unprocessed appeal when the petitioner's letter of December 19, 1973 was presented in evidence. He announced at the hearing that he would consider that he had a ruling appeal pending before him. In his decision, he dismissed the petition for review, and disposed of the matter as a ruling appeal.

At the hearing the administrative law judge elicited evidence in regard to the cause of termination of the claimant's work for the petitioner, and as to the cause of the petitioner's delay in responding to the notice of the filing of the claim. Regarding the latter, the petitioner could only explain his delay in terms of possibilities, such as that he might have received the notice late, or that he might have been away at the time it came. He pointed out that at that time, he was under a tremendous strain working four or five extra hours a day trying to get things around his office under control again from the disarray created by what the claimant had allegedly done that caused him to fire her. He also explained that at the same time, he had lost his other secretary in consequence of all of this.

Regarding the cause of termination of work, petitioner testified that he fired the claimant because she was stealing from him by writing herself additional checks, and that he fired her as soon as he discovered that she was responsible for the stealing. After her discharge he also discovered that she had set a huge number of forms aside and had not completed them. She had also botched up the computer so that the wrong names were plugged into it.

The question presented by this appeal is whether it was proper under the circumstances of this case for the Department to charge the petitioner's account with the benefit payments made to Shirley F. Irving. In turn this breaks down into three subordinate questions:

1. Has the petitioner been so prejudiced by delay or other circumstances in his ability to show within the framework of this proceeding that he had a good basis for his ruling appeal filed on December 19, 1973,

that it would now be inequitable for that reason alone to permit his account to be charged with the protested benefit payments.

2. If not, has the petitioner established in this proceeding that by the prosecution of such an appeal, he would have been able to show that he had good cause for his delay in responding to the notice of the filing of the claim, so that he would have become entitled to a ruling and/or determination in regard to the cause of termination of the claimant's work.

3. If so has the petitioner established in this proceeding that he would have been able to show that the claimant was discharged from her employment by him for misconduct connected with her work.

REASONS FOR DECISION

The evidence presented to the administrative law judge establishes that the petitioner filed a timely appeal from the Department's first denial of a ruling and/or determination. The Department should have forwarded that appeal promptly to the appeals division for processing. Through some error upon the part of Department personnel, this was not done, and in consequence, the appeal was never set for hearing and disposed of.

The administrative law judge attempted to correct this error by dismissing the present petition and treating the proceeding before him as being the ruling appeal. This, however, was an improper procedure for several reasons: First, no notice had been given of a hearing to be held on a ruling appeal, and the Department was not present to waive its right to such, nor was any waiver of notice asked of the petitioner. Second, at the most, a ruling decision can only serve as a means of preventing the future imposition of a charge. It cannot remove a charge that has already been imposed, as is the case in this protest proceeding. Third, there were issues before the administrative law judge beyond the scope of the ruling appeal upon which the petitioner was entitled to have a decision issued on the merits of the petition. The administrative law judge had no basis for merely dismissing the petition as he did.

The first issue which the administrative law judge should have decided under the petition before him was whether the petitioner's rights have been so prejudiced by the Department's error that it would now be inequitable for that reason alone to charge his account for the

benefit payments which the claimant has received. If these benefit charges are not removed from the petitioner's account, they will become a potential burden upon his future tax rates. However, if they are removed, they will have to be charged to the balancing account where they will become a potential burden upon the future taxes of the group of all of the employers of this state. We must, therefore, balance the equities of the petitioner as against the whole group of employers in regard to where the tax burden of these benefit payments should finally come to rest.

In Bell-Brook Dairies, Inc. v. Bryant (1950), 35 Cal. 2d 404, 218 P. 2d 1, the Department had failed to perform its official duty of notifying the employer of the filing of the benefit claim. The California Supreme Court held that it would be inequitable under such circumstances to charge the employer's account with the benefits that had been paid to the claimant. In this regard, the court said that:

> "It is clear that plaintiff was prejudiced by the failure of defendant to give the required notice. Although it eventually received statements of charges to its account which showed that claims for benefits had been made and allowed, lack of proper notice deprived plaintiff of the opportunity to defeat the claims by offering the claimants suitable employment. Further, because of the lapse of time before learning of the charges against its account, it may have been deprived of the means of showing that the claimants were ineligible for benefits on other grounds."

In the matter before us, it was a different type of duty that the Department neglected to perform. Petitioner was not prejudiced by the loss of any of the opportunities mentioned by the court in the Bell-Brook Dairies case because he received notice of the filing of the claim. The opportunities that he may have lost are of a different character.

Primarily, they consist of the opportunities that erode with undue delay, like the ability to marshal evidence, and locate and present witnesses. If no prejudice has been suffered in this regard then within framework of this proceeding, petitioner may obtain the removal of the protested charge from his account by proving that it should never have been imposed in the first place. There is no indication, or even suggestion in the record that petitioner has been prejudiced in any way in presenting his position, by the delay involved, or by any other circumstances.

At the hearing on this protest denial petition, the petitioner was afforded a full opportunity to show that he had a meritorious ruling appeal. He presented his evidence in regard to the cause of the delay in his furnishing information in response to the notice of the filing of the claim. We have carefully reviewed that evidence.

First there is the evidence that petitioner received a telephone call from a Department interviewer which he recalls as having been within two weeks after the claimant's termination. Such a call within that time frame would not be consistent with the Department's scheduling of interviews. With all the confusion that the petitioner, himself, describes as having existed in his office at that time, it is much more likely that he is also confused in regard to the time interval that elapsed before he received that telephone call. It is also unlikely that he would have delayed so long in responding to the notice of the filing of the claim, if he had received a telephone call from a Department interviewer that soon after it was filed.

Petitioner does not assert that he received more than one telephone call from a Department interviewer in regard to this matter. A written departmental record of interview reliably documents that he did receive one on December 17, 1973. Accordingly, we find that the telephone call to which the petitioner refers is the one that he received on that date, apparently during a departmental interview of the claimant following the receipt of the petitioner's response of December 12, 1973, which date we find to be the earliest date upon which petitioner furnished information.

Next there is the petitioner's assertion as a ground of appeal from the denial of a determination and/or ruling that he did not receive notice of the filing of the claim until ten days before his written response on December 12, 1973. His own evidence presented at the hearing before the administrative law judge in this protest proceeding is not only insufficient to establish the truth of that assertion, but clearly reflects that he does not know as a fact whether it is true or not. It is one of several possibilities that he believes might have occurred. Such an explanation only in terms of conjecture as to what might have happened does not establish good cause for delay.

The more likely probability is that the notice was received in due course at the petitioner's office, but was overlooked because of the confusion into which the administration of his office was plunged by the firing of the claimant and the almost simultaneous leaving of

his other secretary. We would be inclined to give sympathetic consideration to a reasonable delay in responding caused by such a situation. The evidence, however, does not go far enough to support such an unusually lengthy delay of 34 extra days beyond the ten-day period regularly allowed by law for responding. It is our conclusion, therefore, that good cause has not been shown for the petitioner's delay in responding to the notice of the filing of the claim; that accordingly a ruling and/or determination on the cause of the claimant's termination of work was properly denied to him, and that upon a hearing of the appeal which he filed but which was never processed, the departmental denial should have and would have been upheld.

It is not improper to charge an employer's account for benefits paid to a claimant who may have left work for disqualifying reasons, where the employer fails to furnish information within the time prescribed by the code. Relief from charges under code section 1032 requires that an employer be timely as well as right in raising a termination issue. Since the petitioner was not timely, the cause of the claimant's leaving work for him has become irrelevant in regard to the charging of his account for the benefits paid. The burden of this protested charge is not one which the group of all of the employers in this state should be made to bear under such circumstances.

Accordingly, upon complete review of the entire situation, we find that the petitioner has not been prejudiced by the Department's error in not processing his ruling appeal because the evidence presented in this proceeding clearly establishes that he would not have prevailed in that appeal; that the protested charge is a proper one against his account under the facts of this case; and that no special equity has been shown which upon balance would justify the removal of the charge from his account.

We do not consider that the petitioner's unprocessed ruling appeal is properly before us for decision at this time, but note that unless there are still any potential charges that might arise out of the subject termination, any further hearing on that appeal would be purposeless, and it should be dismissed as moot. Any additional actual charges already made to the petitioner's account as of a subsequent computation date should be reviewed only by way of protest proceedings like the present one before us.

DECISION

The decision of the administrative law judge is modified. The petition for review is denied. The appeal from denial of ruling is considered as not before us in these proceedings.

Sacramento, California, May 4, 1976

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